



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1403 OF 2007

(IN THE OF ORIGINAL ACTION)

TULIP PROPERTIES LIMITED.....PLAINTIFF

VERSUS

MOHAMED KORIOW NUR

SIMON KIPRONO LABOSO

MACDONALD LIJOODI MARAKA

NOOR MOHAMED HASSAN.....1ST DEFENDANT

DAVID MWENJE.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

(BY WAY OF COUNTERCLAIM)

MOHAMED KORIOW NUR.....1ST PLAINTIFF

SIMON KIPRONO LABOSO.....2ND PLAINTIFF

MACDONALD LIJOODI MARAKA.....3RD PLAINTIFF

NOOR MOHAMED HASSAN.....4TH PLAINTIFF

VERSUS

TULIP PROPERTIES LIMITED.....1ST DEFENDANT

H.E. DANIEL TOROITICH ARAP MOI.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

RULING

The hearing of this suit commenced on 2nd November, 2016, nine (9) years after the suit was filed. So far, the evidence of two witnesses for the plaintiff has been taken. The plaintiff's third witness, Jaswant Singh Rai (PW3) started giving evidence on 7th March, 2018 and continued on 8th March, 2018 when he was stood down after an objection was raised against the production in evidence of the stamped counter-part of the instrument of transfer dated 5th June, 1996 in respect of L.R No. 14277, Title Number I.R. 46540 said to have been executed by Daniel

Toroitich Arap Moi in favour of the plaintiff. This ruling is in respect of the said objection.

In his evidence before he was stood down, Jaswant Singh Rai (hereinafter referred to only as “PW3”) told the court that he was the Managing Director of the plaintiff. He stated that the plaintiff purchased all that parcel of land known as L.R No. 14277(hereinafter referred to only as “the suit property”) from His Excellency Daniel Toroitich Arap Moi, the former president of the Republic of Kenya through an agreement for sale dated 22nd May, 1996. His Excellency Daniel Toroitich Arap Moi is the 2nd defendant in the counter-claim that has been brought herein by the 1st defendant in the main suit. I will refer to him hereinafter only as “Arap Moi”. He stated that after the plaintiff paid the full purchase price in the sum of Kshs. 25,000,000/- to Arap Moi, Arap Moi executed an instrument of transfer in respect of the suit property in favour of the plaintiff. He stated that the said instrument of transfer was executed by Arap Moi in the presence of the Registrar of Titles after which the same was handed over to him together with the original title for the suit property. PW3 stated that he handed over the instrument of transfer together with the original title to the plaintiff’s advocate Mr. Goswami for registration. PW3 produced as exhibits photocopies of the agreement for sale between the plaintiff and Arap Moi and the title for the suit property. When he sought to produce a photocopy of the original instrument of transfer dated 5th June, 1996 as an exhibit on 7th March, 2018, an objection was raised against the same by the advocates for the 1st defendant on the ground that a proper basis had not been laid for the same. In response to that objection, the plaintiff’s advocate postponed the production of the said photocopy of the instrument of transfer and undertook to ask the witness to look for the original thereof.

When the hearing of the suit resumed on 8th March, 2018, PW3 told the court that he was present when Arap Moi signed the instrument of transfer in respect of the suit property in favour of the plaintiff. He stated that Arap Moi signed three (3) copies of the transfer. He stated that the last time he saw the original copy of the transfer is when the same was handed over to him by the plaintiff’s advocate who was handling the conveyancing transaction together with the counter-part thereof and the original title. He stated that he gave the advocates handling this suit for the plaintiff a photocopy of the instrument of transfer to include in the bundle of documents and kept the original in his office. PW3 stated that while preparing to give evidence in this case he searched for the original copy of the transfer but could not trace it. He stated that he had the counter-part of the said instrument of transfer which was also presented to the lands office and stamped. He stated that he was still looking for the original copy of the said instrument of transfer and if the same was found, he would surrender the same to the court. He requested in the meantime to be allowed to produce the counterpart of the said instrument of transfer as an exhibit in the case pursuant to section 68(1)(c) of the Evidence Act, Chapter 80 Laws of Kenya.

PW3’s request was objected to by the advocates for the 1st defendant in the main suit who are also the plaintiffs in the counter-claim through their advocates, Mr. Arusei, Mr. Omuganda and Mr. Nyaburi. Mr. Arusei who led the attack against the production of the said document submitted that his objection was founded on sections 68 and 69 of the Evidence Act. He cited the case of In re estate of Charles Kiragu Ndegwa alias Ndegwa Kiragu-Deceased[2016]eKLR and submitted that the original transfer the counterpart of which PW3 sought to produce was in the possession of PW3 and that PW3 had not satisfied the conditions under section 68 of the Evidence Act for the production of secondary evidence. He argued that there was no evidence that the original transfer had been lost and that in any event, PW3 had stated that given time, he could produce the original transfer. Mr. Arusei referred to section 69 of the Evidence Act and submitted that Notice to produce had not been served upon the defendants which was also a condition precedent to the production of the said counter part of the transfer.

Mr. Arusei submitted further that documents are supposed to be produced in evidence by the makers thereof and that PW3 who was not the maker of the counterpart transfer could not produce the same unless the exceptions set out under section 35 of the Evidence Act were established. He contended that it had not been established that the maker of the document was dead, cannot be found or could only appear in court with a lot of difficulty. For this submission, he cited the case of Lilian Wangui Muhunyu & another v Sisters of Mercy(2017)eKLR. He argued that the makers of the instrument of transfer in dispute were the 2nd and 4th defendants in the counter-claim and that they were the ones who were competent to produce the same in evidence.

Mr. Omuganda associated himself with the submissions of Mr. Arusei. He made reference to section 65(2) and (3) of the Evidence Act and submitted that the counterpart transfer sought to be produced was disputed and further, that the document was not being produced by the person who executed it. He submitted further that the 2nd defendant in the counterclaim who is said to have executed the transfer had not alluded to the said transfer in his pleadings and that questions touching on the entries made on the said instrument of transfer and payment of stamp duty could only be established from the original document. Mr. Omuganda submitted that the exceptions under section 67 of the Evidence Act had not been established and urged the court to reject the production of the contested document until a proper basis for the same was laid.

Mr. Nyaburi associated himself with the submissions of Mr. Arusei and Mr. Omuganda. He argued that the plaintiff had not satisfied the conditions set out in section 68(1)(c) of the Evidence Act for the production of secondary evidence. He argued that PW3 who had admitted that the original transfer had been in his possession had failed to give an adequate explanation on the whereabouts of the document to satisfy the provisions of section 68 of the Act.

In response to the objection, Mr. Oraro SC for the plaintiff submitted that the defendants’ advocates had misunderstood the plaintiff’s application which was not concerned with proof of the genuineness of the signature of the 2nd defendant in the counterclaim on the document in contention or the payment of stamp duty. He submitted that the plaintiff’s application was to be allowed to produce the counterpart transfer because the original transfer could not be traced. Mr. Oraro submitted that the application had nothing to do with section 35 of the Evidence Act. He argued that PW3 wished to adduce secondary evidence and that the conditions set out under section 68 of the Evidence Act had been satisfied.

Mr. Oraro submitted further that the disputed counterpart of transfer was required by law under section 34 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and was duly endorsed by the Registrar of Titles. He submitted that under section 83 of the Evidence Act the court should assume the transfer to be genuine. Mr. Oraro submitted that the cases that were cited by the defendants were not relevant. Mr. Oraro submitted that the document that the plaintiff sought to produce was not made by Arap Moi but by Sobhag H. Shah & V. Goswami Advocates and that since it was a statutory document, it was not necessary that it be produced by those who executed the same. Lastly, he submitted that any interpretation of the law that would negate sections 23 and 34 of the Registration of Titles Act (now

repealed) as well as section 83 of the Evidence Act would make a complete nuisance of section 68 of the Evidence Act.

Determination:

I have considered the objection by the 1st defendant in the main suit to the production of the counterpart of the transfer dated 5th June, 1996 by PW3 and the response thereto by the plaintiff's advocate. What I need to determine is whether the plaintiff has laid a proper basis for the production of the said counterpart of the transfer dated 5th June 1996. Section 65(1) to (4) of the Evidence Act provides as follows:

“65(1) Primary evidence means the document itself produced for the inspection of the court.

(2) Where a document is executed in several parts, each part is primary evidence of the document.

(3) Where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

(4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.”

As I have stated earlier in this ruling, the plaintiff's application to produce the counterpart of the transfer dated 5th June, 1996 was brought under section 68(1) (c) of the Evidence Act. Section 68 of the Evidence Act provides as follows:

“68. Proof of documents by secondary evidence

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

(a) when the original is shown or appears to be in the possession or power of—

(i) the person against whom the document is sought to be proved; or

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) any person legally bound to produce it,

and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents”.

I am satisfied that the plaintiff has laid a proper basis for the production in evidence of either the counterpart of transfer dated 5th June, 1996 or a photocopy of the original transfer dated 5th June, 1996 that was objected to initially by the 1st defendant in the main suit. PW3 gave evidence that Arap Moi executed three (3) copies of the instrument of transfer of the suit property in favour of the plaintiff which he handed over to the plaintiff's advocate together with the original title for registration. He stated that the plaintiff's advocate returned to him the original transfer and the counterpart thereof after registration together with the original title. PW3 stated that during the preparation of the plaintiff's bundle of documents filed herein 22nd October, 2014, he gave to the plaintiff's advocates on record a copy of the original instrument of transfer which is at pages 35 and 36 of the plaintiff's bundle of documents. PW3 stated that while preparing to give evidence in this case, he looked for the original transfer but could not trace it. He however managed to get the counterpart of the transfer which he sought to produce instead of the photocopy of the original transfer in the plaintiff's bundle of documents.

I am of the view that the counterpart of transfer dated 5th June, 1996 whose admissibility is contested is primary evidence under section 65(2) and (3) of the Evidence Act while a copy of the original transfer at pages 35 and 36 of the plaintiff's bundle of documents is secondary evidence. In the circumstances, the counterpart of transfer dated 5th June, 1996 is admissible under section 67 of the Evidence Act. In the case of Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others, KSM CA No. 5 of 2018, (2018) eKLR, the Court of Appeal held that a counterpart of a document constituted a primary evidence under section 65(2) and (3) of the Evidence Act. The court stated as follows:

“...under Section 65 (2) and (3) of the Evidence Act, the documents tendered in evidence by the 3rd and 4th respondents were executed in several parts or in counterpart and they prima facie qualify to be primary documents.”

As to the competency of PW3 to produce the document, I am not in agreement with the 1st defendant that the document can only be produced by Arap Moi or the 3rd and 4th defendants in the counter-claim. As rightly pointed out by Mr. Oraro SC, the document was prepared by Sobhag H. Shah & V. Goswami Advocates and not by the parties mentioned above. PW3 testified that after the transfer was registered, the original transfer and a counterpart thereof that he has sought to produce in evidence were handed over to him by the said firm of Sobhag H. Shah & V. Goswami Advocates. I am of the view that since PW3 is the one who has in his possession the counterpart of transfer dated 5th June, 1996, he is the person well placed to produce the same in evidence and to answer any question which may arise in relation thereto. The admission of the document in evidence does not however preclude the defendants from challenging its authenticity. The burden still rests with the plaintiff to prove that the document was executed by Arap Moi, stamped and registered. The Evidence Act contains elaborate provisions on the burden of proof. Arap Moi who is said to have executed the document is a party to this suit. He has filed a defence to the counter-claim that has been raised against him by the 1st defendant in the main suit. The 1st defendant will have an opportunity to interrogate him on the document.

Due to the foregoing, I find no merit in the objection by the 1st defendant in the main suit against the production in evidence of the counterpart of transfer dated 5th June, 1996. The objection is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 10th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Rabut for the Plaintiff in the main suit and

1st defendant in the Counter-Claim

Ms. Mulovi, Mr. Arusei and Mr. Omuganda for the 1st defendant in the main suit and Plaintiffs in the Counter-Claim

N/A for the 2nd Defendant in the main suit

N/A for the 2nd Defendant in the Counter-Claim

Mr. Kamau for the 3rd and 4th Defendants

in the main suit and the Counter-Claim

Catherine-Court Assistant